Supreme Court, U.S.
FILED
AUG 24 1992
OFFICE OF THE CLERK

92-497

In the Supreme Court of the United States

OCTOBER TERM, 1992

THE BABCOCK & WILCOX COMPANY,
Petitioner,

VERSUS

INTERNATIONAL INSURANCE COMPANY AND UNITED STATES FIRE INSURANCE COMPANY,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

Whether the Court of Appeals erred in granting a petition for a writ of mandamus on a discretionary decision by the District Court without a clear and indisputable reason to do so and without giving a "reasoned exposition for the basis of its action," in contravenion of the standards of *Will v. United States*?

LIST OF PARTIES

The parties to the proceedings below were the petitioner, The Babcock & Wilcox Company and respondents, International Insurance Company and the United States Fire Insurance Company.

RULE 28.1 LIST

The parent corporation of the Babcock & Wilcox Company is McDermott International, Inc.

Subsidiaries, Affiliates and Partnerships of McDermott International, Inc. (Excluding Wholly-Owned Subsidiaries)

Davy McDermott Ltd.
Initec, Astano Y McDermott International Inc., S.A.
Malmac Sdn. Bhd.
McDermott Arabia Company Limited
McDermott-ETPM, Inc.
P.T. McDermott Indonesia
McDermott Incorporated
B&W Mexicana, S.A. de C.V.
Babcock & Wilcox Beijing Company, Ltd.
Diamond Power Hubei Company Ltd.
Babcock & Wilcox Gama Kazan Teknolojisi Anonim Sirketi
Thermax Babcock & Wilcox Private Ltd.
Hudson Northern Industries, Inc.
Rotovent S.A. de C.V.
Diamond Power (Autralia) Pty. Limited
Halley & Mellowes Pty. Ltd.
Heerema-McDermott (Aust.) Pty. Ltd.
HeereMac
Panama Offshore Chartering Company, Inc.
McDermott (Nigeria) Limited

McDermott Scotland Limited
MMC - McDermott Engineering Sdn. Berhad
P.T. Babcock & Wilcox Indonesia
P.T. Bataves Fabrications
Topside Contractors of Newfoundland, Ltd.
Arabian Petroleum Marine Construction Company
DB/McDermott Company
Abahsain Hudson Heat Transfer Co. Ltd.
Construcciones Maritimas Mexicanas, S.A. de C.V.
ASEA Babcock PFBC
B&W Fuel Company
B&W Nuclear Service Company
Babcock-Ultrapower Jonesboro
Babcock-Ultrapower West Enfield
Diamond Power Specialty Limited
Espacialidades Termomecanicas S.A. de C.V.
Babcock & Wilcox Services, Inc.
KBW Gasification Systems, Inc.
North American CWF Partnership
Palm Beach Energy Associates
Maine Power Services
Power Safety International, Inc.
South Point CWF

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1992

THE BABCOCK & WILCOX COMPANY,

Petitioner,

VERSUS

INTERNATIONAL INSURANCE COMPANY AND UNITED STATES FIRE INSURANCE COMPANY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioner, The Babcock & Wilcox Company respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled proceeding on June 25, 1992.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is not reported, and is reprinted as Appendix A hereto, p. A-1, *infra.* Babcock & Wilcox's Petition for Reconsideration for the Court's Grant of Writ of Mandamus was denied. The denial is reprinted as Appendix B hereto, p. A-2, *infra.*

The decision of the United States District Court for the Eastern District of Texas, Beaumont Division (Fisher, D.J.) has not been reported. The order and amended order are reprinted as Appendixes C and D hereto, p. A-3 and p. A-4, *infra*.

JURISDICTION

Petitioner filed suit in the District Court for Jefferson County, Texas, and the respondents, pursuant to 28 U.S.C. § 1446, removed the case to the United States District Court for the Eastern District of Texas, Beaumont Division.

On June 25, 1992, the Fifth Circuit Court of Appeals granted the respondents' Petition for a Writ of Mandamus ordering the District Court for the Eastern District of Beaumont to transfer the suit to the District Court for the Eastern District of Louisiana.

The jurisdiction of this Court to review the judgment of the Fifth Circuit is invoked under 28 U.S.C. § 1254 (1).

STATUTES INVOLVED

28 U.S.C. § 1651. Writs

> (a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.
>
> (b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

28 U.S.C. § 1404. Change of Venue

(a) For the convenience of parties and witnesses, in the interest of justice, a District Court may transfer any civil action to any other district or division where it might have been brought.

(b) Upon motion, consent or stipulation of all parties, any action, suit or proceeding of a civil nature or any motion or hearing thereof, may be transferred, in the discretion of the court, from the division in which pending to any other division in the same district. Transfer of proceedings in rem brought by or on behalf of the United States may be transferred under this section without the consent of the United States where all other parties request transfer.

(c) A District Court may order any civil action to be tried at any place within the division in which it is pending.

(d) As used in this section, "District Court" includes the United States District Court for the District of the Canal Zone; and "district" includes the territorial jurisdiction of that court.

STATEMENT OF THE CASE

A. COURSE OF PROCEEDINGS AND DISPOSITION OF THE CASE.

1. Beaumont Litigation

The Babcock & Wilcox Company filed suit on March 15, 1991 in the District Court for Jefferson County, Texas against International Insurance Company and United States Fire Insurance Company for amounts due from pay-

ment of nationwide asbestos claims. International and U.S. Fire were subscribers to first layer excess insurance policies from 1981 - 1986. On April 9, 1991, the insurance companies removed the litigation from the State District Court in Jefferson County, Texas to the United States District Court for the Eastern District of Texas, Beaumont Division pursuant to 28 U.S.C. § 1441, diversity of citizenship.

The insurance companies filed a Motion to Dismiss and/or Transfer Venue in the United States District Court for the Eastern District of Texas, Beaumont Division. The motion requested that the district court either dismiss the pending Beaumont litigation pursuant to "first-filed" rule or transfer the Beaumont litigation to the United States District Court for the Eastern District of Louisiana pursuant to 28 U.S.C. § 1404(a).

On May 28, 1992, the United States District Court for the Eastern District of Texas, Beaumont Division held a hearing on the Motion to Dismiss and/or Transfer Venue. After arguments were heard and evidence submitted, the District Court denied the Motion to Dismiss and/or Transfer Venue.[1] The Court subsequently amended its order denying Defendants' Motion to Dismiss and/or Transfer Venue[2] holding that the case should not be dismissed because the evidence presented indicated that the insurance companies declaratory judgment action was filed in anticipation of litigation. The District Court denied the Motion to Transfer Venue after determining that Texas is the more convenient forum for this litigation. The Court

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[1] Order Denying Defendants' Motion to Dismiss and/or Transfer Venue, and is reprinted as Appendix C hereto, p. A-3, *infra*.

[2] Amended Order Denying Defendants' Motion to Dismiss and/or Transfer Venue, and is reprinted as Appendix D hereto, p. A-5, *infra*.

based its decision on the facts that the witnesses, particularly the non-party witnesses, are located in Texas and also that the contract was executed in Texas.

The insurance companies filed a Petition for a Writ of Mandamus with the Fifth Circuit Court of Appeals on the District Court's denial of the Motion to Dismiss and/or Transfer Venue. The issue presented in the petition was "whether the Court below erred in failing to stay, dismiss, or transfer the Texas Action to the United States District Court for the Eastern District of Louisiana pursuant to the 'first-filed' rule" (Appendix E hereto, p. A-7, *infra*). The petitioners responded to this brief (Appendix F hereto, p. A-29, *infra*).

The Fifth Circuit granted the Petition for Writ of Mandamus and directed the District Court to transfer the case to the Eastern District of Louisiana[3] without any written reasons for the grant of the Petition for Writ of Mandamus. A request for reconsideration filed (Appendix G hereto, p. A-57 *infra*) by the Petitioner was denied (Appendix B hereto, p. A-2, *infra*).

2. Louisiana Litigation

The insurance companies filed a complaint for declaratory judgment in the United States District Court for the Eastern District of Louisiana against McDermott Incorporated[4] and The Babcock & Wilcox Company. The

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[3] Fifth Circuit Order of June 25, 1992, and is reprinted as Appendix A hereto, p. A-1, *infra*.

[4] McDermott is the parent corporation of the Babcock & Wilcox Company. McDermott has not sought coverage from these insurers for McDermott operations. All asbestos related claims asserted against these policies of insurance arise out of Babcock & Wilcox operations.

Declaratory Judgment seeks to avoid payment of the asbestos related claims against the Babcock & Wilcox Company. This is the "companion" case to the instant litigation.

McDermott and Babcock & Wilcox, in response to the Petition for Declaratory Judgment filed by International and U.S. Fire, filed a Motion to Dismiss the Petition in the Eastern District of Louisiana under Rule 12 of the Federal Rules of Civil Procedure citing a forum selection clause in the contract of insurance in favor of the assured. The United States District Court for the Eastern District of Louisiana, the Honorable Judge A.J. McNamara, granted McDermott's and Babcock & Wilcox's Motion to Dismiss based on the forum selection clause contained in the policies and the pending litigation in Beaumont. Judge McNamara found the forum selection clause to be valid and enforceable.

International and U.S. Fire filed an appeal from that decision to the Court of Appeals for the Fifth Circuit. On February 19, 1992, the Fifth Circuit Court of Appeals vacated Judge McNamara's dismissal and remanded the proceedings to district court. On March 9, 1992 the Fifth Circuit Court of Appeals withdrew the February 19, 1992 opinion and substituted another in its place. A Suggestion for Rehearing En Banc was filed by McDermott and Babcock & Wilcox but was subsequently denied.

McDermott and Babcock & Wilcox have petitioned this Court for a Writ of Certiorari requesting the enforcement of the forum selection clause contained in the policies, in Case No. 91-1976 entitled *McDermott Incorporated and The Babcock & Wilcox Company v. International Insurance Company and United States Fire Insurance Company.*

B. STATEMENT OF THE FACTS.

For more than one hundred years, Babcock & Wilcox has been in the business of manufacturing large pressure boilers for power generation in factories, ships and heavy industry. Approximately one hundred thousand claims nationwide asserting personal injury from exposure to asbestos have been made against Babcock & Wilcox related to its production of power generation equipment. These claims have been asserted primarily by persons who worked on or near the pressure boilers.

Babcock & Wilcox over many years of operation acquired numerous umbrella liability insurance policies from various insurers for different layers of insurance coverage. During the periods of April 1, 1981 to April 1, 1982 and April 1, 1982 to April 1, 1985 International, U.S. Fire as well as other insurers, that are not part of this suit, issued to Babcock & Wilcox first layer umbrella liability insurance policies.[5] All insurers subscribing to these policies of insurance except International and U.S. Fire have paid the claims.

McDermott and Babcock & Wilcox made demand for payment to International and U.S. Fire, through their counsel, for asbestos related claims. International and U. S. Fire did not make payment nor respond to the final demand but rather they filed a suit for Declaratory Judgment in the United States District Court for the Eastern District of Louisiana. The Babcock & Wilcox Company filed suit in District Court for Jefferson County, Texas and the insurance companies removed the suit to the United

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[5] Although there are other upper layer excess insurance policies issued to McDermott and Babcock & Wilcox by International and U.S. Fire those policies are not in controversy.

States District Court for the Eastern District of Texas, Beaumont Division. After Motions to Dismiss and/or Transfer Venue were filed in both the Eastern District of Louisiana and the Eastern District of Texas by Babcock & Wilcox and the Insurance Companies, respectively, each district court denied the motion. The insurance companies sought a Writ of Mandamus from the Fifth Circuit, which was granted. Babcock & Wilcox requested reconsideration of the ruling, but was denied. Babcock & Wilcox seek to have the improper grant of the Writ of Mandamus reviewed by this Court.

REASONS FOR GRANTING THE WRIT

I.

THE COURT OF APPEALS FAILED TO GIVE ANY REASON FOR GRANTING A PETITION FOR WRIT OF MANDAMUS IN CONTRAVENTION OF THE RULE OF *WILL V. UNITED STATES*

The insurance companies, respondents herein, moved the district court in Beaumont, Texas to dismiss this litigation pursuant to the "first-filed" rule or transfer the litigation from Beaumont to the Eastern District of Louisiana based upon application of 28 U.S.C. § 1404(a). These arguments were thoroughly briefed by the parties and evidence presented to the district court in Beaumont. A hearing before the district court was held in which arguments were heard and after weighing all the facts and evidence, the district court denied the motion to dismiss or transfer, holding that the suit was properly brought in Beaumont. The court specifically determined that special circumstances existed to avoid the mechanical application of the "first-filed" rule, i.e. that the insurance companies

filed their declaratory judgment action in anticipation of a subsequent suit brought by the insured or a "race to the courthouse." And, the court determined that the witnesses, including non-party witnesses, were located in Texas and that the contract in question was executed in Texas. Therefore, the court concluded, pursuant to 28 U.S.C. § 1404(a), that Texas was the more convenient forum for trial of this matter.[6] After the district court's decision, the respondents petitioned the Fifth Circuit Court of Appeals for issuance of a Writ of Mandamus based solely upon an alleged misapplication of the "first-filed" rule by the district court. The respondents argued that the district court improperly considered a forum selection clause contained in the contract of insurance.[7]

The Fifth Circuit granted the petition for writ of mandamus. The petition was granted without oral argument and without review of the record below. The Fifth Circuit did not provide any written or oral reasons for this extraordinary ruling, merely directing "...the District Court to transfer the case to the Eastern District of Louisiana." (Appendix A hereto, p. A-1.) The Fifth Circuit acted in contravention of the standards for grant of a petition for writ of mandamus issued by this Court, i.e.: that extraordinary writs *must not* be granted without written reasons.

This Court in *Will v. United States*, 389 U.S. 90, 88 S.Ct. 269, 19 L.Ed.2d 305 (1967), stated that:

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[6] Amended Order and is reprinted as Appendix D hereto, p. A-5, *infra*.

[7] There is conflict between the parties regarding the Beaumont court's ruling since respondents urged, in an affidavit by their counsel, that the district court made its decision based solely upon the forum selection clause. Both the district court (in its written reasons) and the petitioners disagree with the statements contained in the affidavit of respondents' counsel and believe the affidavit to be misleading at best.

> Due regard, not merely for the reviewing functions of this Court, but for the "drastic and extraordinary" nature of the Mandamus remedy *Ex Parte Fahey*, 332 U.S. 258, 259, 67 S.Ct. 1558, 1559, 91 L.Ed 2041 (1947), and for the extremely awkward position in which it places the District Judge, *Id.* at 260, 67 S.Ct. at 1559 *demands that a court issuing the writ give a reasoned exposition of the basis for its action.* (Emphasis added.)

The Fifth Circuit Court of Appeals gave no reasons for granting the petition for the writ of mandamus. As a result, neither petitioner nor the district court knows on what basis the Fifth Circuit has granted the writ. The Fifth Circuit did not stay or dismiss the case, which is the remedy for the "first-filed" rule, but *transferred* the case, leaving the movers and the district court in the dark as to their review and/or reasons. Apparently the Fifth Circuit granted the writ pursuant to 28 U.S.C. § 1404(a) since a transfer was ordered. Such a confusing act by the appellate court is manifestly unfair to the district court judge and petitioners and in direct contravention to this court's ruling in *Will v. United States.*

II.

THE COURT OF APPEALS GRANTED RELIEF NOT SOUGHT, NOT BRIEFED, AND CONTRARY TO THE FACTS AND EVIDENCE SUBMITTED TO THE DISTRICT COURT

The insurance companies, respondents herein, raised but one issue for review by petition for writ of mandamus, i.e.: the propriety of the District Court's failure to dismiss or stay the case pursuant to the "first-filed" rule. Thereafter, the Fifth Circuit ordered a transfer of the litiga-

tion apparently under 28 U.S.C. § 1404(a). A transfer is not appropriate relief when the "first-filed" rule applies.[8] If the "first-filed" rule applies, then the case should be stayed or dismissed. A transfer of venue pursuant to 28 U.S.C. § 1404(a) may be appropriate if a court, having considered the facts, makes certain factual findings regarding witnesses, parties, etc. The district court heard arguments and evidence and decided not only that a transfer was not warranted but that Texas was the proper venue. The court of Appeals granted a *transfer* without the issue before them, without the evidence, and without stating any reasons. This is the exact situation and confusion sought to be avoided by the decision in *Will v. United States.* This Court has determined that mandamus is a vital corrective and didactic function that cannot be served without findings of fact by the issuing court and some statement of the court's legal reasoning. *Will v. United States,* 389 U.S. at 107, 88 S.Ct. at 280. Since the Fifth Circuit did not see fit to explain its extraordinary and improper act, neither this Court nor the district court nor the petitioners have a reasonable explanation of the decision in order to obtain proper appellate review.

III.

THE COURT OF APPEALS FAILED TO CONSIDER THE IMPORTANCE OF THE FORUM SELECTION CLAUSE IN CONTRAVENTION OF *STEWART ORGANIZATION V. RICOH*

The insurance companies, respondents herein, petitioned the Court of Appeals for issuance of a writ of

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[8] See, *West Gulf Maritime Ass'n v. ILA Deep Sea Local 24,* 751 F.2d 721, 729 (1985). "A court may...in its discretion dismiss a declaratory judgment or injunctive suit if the same issue is pending in litigation elsewhere." (Citation omitted.)

mandamus based upon the alleged wrongful consideration of the forum selection clause,[9] in relation to the "first-filed" rule. The court of appeals, as discussed, supra, apparently ordered a transfer pursuant to 28 U.S.C. § 1404(a). The court of appeals therefore, did so without proper regard or reference to the forum selection clause contained in the contract of insurance.

If the Fifth Circuit granted the writ of mandamus based on the respondent's sole argument that the forum selection clause should not be considered, they have further erred. This Court has held when a request for transfer pursuant to 28 U.S.C. § 1404(a) is before the Court the existence of a forum selection clause in the contract between the parties is a *significant factor that should figure centrally in the District Court's decision. Stewart Organization, Inc. v. Ricoh Corp.*, 487 U.S. 22, 29, 108 S.Ct. 2239, 2244, 101 L.Ed.2d 22 (1988). The district court did, in fact, consider the existence of the forum selection clause, as well as, other significant factors, i.e.: the location of the witnesses and when the contract was executed, in making its decision. However, from the present order it is impossible to determine what reasons the Fifth Circuit had when it

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[8] The forum selection clause in this contract of insurance is in wide spread use throughout the insurance industry. The clause in question is standard form and written by insurers. *Reference Book of Marine Insurance Clauses*, Witherby Publishing (London 1979).

The service of suit clause states as follows:

> It is agreed that in the event of the failure of Underwriters hereon to pay any amount claimed to be due hereunder, Underwriters hereon, at the request of the assured, will submit to the jurisdiction of any court of competent jurisdiction within the United States and will comply with all requirements necessary to give such court jurisdiction and all matters arising hereunder shall be determined in accordance with the law and practice of such court.

ordered the transfer of the Beaumont Litigation. Failure to consider the significance of the forum selection clause before transfer would be manifest error by the Court of Appeals.

IV.

THE DISTRICT COURTS PROPERLY TOOK STEPS TO AVOID DUPLICATION OF LITIGATION BETWEEN BEAUMONT AND NEW ORLEANS

The District Court in the present case acted totally within its discretion in its denial of the request for dismissal, stay, or transfer. In fact, the Fifth Circuit Court of Appeals in the companion litigation[10] stated that:

> ...as International and U.S. Fire concede, they must appear in the Texas Court in which McDermott has filed its action, and *must* submit to the jurisdiction of that court. The service of suit clause *requires* as much.
>
> If the issues in that case prove to be duplicative of the issues in the federal action, then it will be up to the *state court* to decide what action to take to avoid trying the same case in two courts. *International Ins. Co. v. McDermott, Inc.*, 956 F.2d 93, 96 (5th Cir. 1992). (Emphasis added.)

The Fifth Circuit, therefore, directed the district

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[10] The companion litigation is currently pending application for writ of certiorari in this court entitled *McDermott Incorporated and the Babcock & Wilcox Company v. International Insurance Company and United States Fire Insurance Company*, Case No. 91-1976. This is the "first-filed" case the district court of Beaumont held, based on the evidence, was filed "in anticipation of litigation" in a race to the courthouse.

court in Beaumont to weigh the factors and to decide what action to take. After weighing all the facts the district court in Beaumont[11] denied the Motion to Dismiss or Transfer based on the evidence and ordered the matter to trial. The district court in New Orleans, following the lead of the district court in Beaumont agreed to hear any matter or issue not heard in Beaumont.[12] In essence, the two District Courts had, as directed by the Court of Appeals, taken steps to avoid duplication of efforts. The Beaumont court agreed to proceed to trial and the New Orleans court agreed to avoid duplication by a later trial. The Fifth Circuit then, without reason or justification, overruled both District Courts and substituted their own opinion and transferred the case without any regard to witnesses or documents involved. The only "usurpation" of power has been by the Fifth Circuit Court of Appeals.

V.

THE DISTRICT COURT PROPERLY EXERCISED ITS DISCRETION AND THERE WAS NO CLEAR AND INDISPUTABLE REASON FOR THE COURT OF APPEALS TO GRANT THE PETITION FOR A WRIT OF MANDAMUS

This Court has recognized that the writ of mandamus:

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[11] The Beaumont district court is acting as the state court since the case had been removed pursuant to diversity jurisdiction.

[12] The district court in Louisiana indicated that it would hear whatever, if anything, was not resolved by the Beaumont case, and is reprinted in the Appendix H hereto, p. A-63, *infra*.

> This court notes that if, in fact, the Texas case proceeds to trial prior to this court's trial date of January 1993, issues resolved at that trial may allow the scope of the present case to be narrowed through motion practice.

> 'has traditionally been used in federal courts "only to" confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so.' *Will v. United States*, 389 U.S. at 95, 389 S.Ct. at 273.

The burden of showing that a writ should issue is on the petitioner and he must show that "the right to the issuance of the writ is clear and indisputable." *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 101 S.Ct. 188, 66 L.Ed.2d 193 (1980) (citations omitted). Further, the remedy of mandamus is a drastic one, to be invoked only in extraordinary situations. *Will v. United States*, 389 U.S. at 104, 88 S.Ct. at 278. No such extraordinary situation exists in the present case. The District Court weighed all of the factors presented to it both in brief and during the hearing and determined, within its discretion, that the motion to dismiss or transfer should be denied.

"Where a matter is committed to discretion, it cannot be said that a litigant's right to a particular result is 'clear and indisputable.' " *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 101 S.Ct. 188, 66 L.Ed.2d 193 (1980), citing *Will v. Calvert Fire Ins. Co.*, 437 U.S. 655, 666, 98 S.Ct. 2552, 2559, 57 L.Ed.2d 504 (1978) (plurality opinion).

There was no 'clear and indisputable' reason for the Fifth Circuit to grant the writ of mandamus. The District Court did not abuse its discretion nor usurp judicial power as is required before the extraordinary remedy of mandamus is granted. *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. at 35, 1101 S.Ct. 190. This District Court's decision should control.

CONCLUSION

For these reasons, this petition for writ of certiorari should be granted. The Fifth Circuit Court of Appeals has acted improperly in the granting the petition for writ of mandamus without written reasons and contrary to the facts and legal issues. Petitioner submits that the District Court's decision was within its discretion and should be reinstated absent a 'clear and indisputable' reason for this improbable result. Babcock & Wilcox further submits that it will be irreparably harmed if the action of the Court of Appeals is sustained.

Respectfully submitted:

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1992

THE BABCOCK & WILCOX COMPANY,

Petitioners,

VERSUS

INTERNATIONAL INSURANCE COMPANY AND UNITED STATES FIRE INSURANCE COMPANY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

CERTIFICATE OF SERVICE

I do hereby certify that a copy of the foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit have been served on all counsel of record by telefaxing, hand delivery and/or by placing same in the United States mail, properly addressed and postage prepaid on this ____ day of August, 1992.

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 91-4598

FILED
JUN 25 1992

IN RE:

INTERNATIONAL INSURANCE COMPANY AND
UNITED STATES FIRE INSURANCE COMPANY,
Petitioner.

**Petition for Writ of Mandamus to the
United States District Court
for the Eastern District of Texas**

Before JOLLY, JONES, and WIENER, Circuit Judges.

BY THE COURT:

IT IS ORDERED that the petition for writ of mandamus is GRANTED. The district court is directed to transfer the case to the Eastern District of Louisiana.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 91-4598

FILED
JUL 2 1992

IN RE:

INTERNATIONAL INSURANCE COMPANY AND
UNITED STATES FIRE INSURANCE COMPANY,
Petitioner.

**Petition for Writ of Mandamus to the
United States District Court
for the Eastern District of Texas**

Before JOLLY, JONES, and WIENER, Circuit Judges.

BY THE COURT:

IT IS ORDERED that petitioner's motion for reconsideration of the Court's order entered June 25, 1992, granting petition for writ of mandamus is **DENIED**.

APPENDIX C

THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

FILED
92 MAY 28

THE BABCOCK & WILCOX COMPANY	§	
VS.	§	CIVIL ACTION
	§	No. 1:91-CV-315
INTERNATIONAL INSURANCE COMPANY AND UNITED STATES FIRE INSURANCE COMPANY	§	

ORDER DENYING DEFENDANTS' MOTION TO DISMISS AND/OR TRANSFER VENUE

On this day came on to be considered the Defendants', International Insurance Company and United States Fire Insurance Company, Motion to Dismiss and/or Transfer Venue, and the Court, having considered the pleadings and heard the arguments of counsel, is of the opinion that should be DENIED.

IT IS, THEREFORE, ORDERED, ADJUDGED and DECREED that the Motion to Dismiss and/or Transfer Venue of the Defendants, International Insurance Company and United States Fire Insurance Company, is hereby DENIED and the case will continue on this Court's

docket as scheduled.

SIGNED this the 28 day of May, 1992.

/s/ J. Fisher

JUDGE PRESIDING

APPENDIX D

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

FILED
92 JUN 16

THE BABCOCK & WILCOX COMPANY	§	
	§	
VS.	§	CIVIL ACTION
	§	No. 1:91-CV-315
INTERNATIONAL INSURANCE COMPANY AND UNITED STATES FIRE INSURANCE COMPANY	§	

AMENDED ORDER DENYING DEFENDANTS' MOTION TO DISMISS AND/OR TRANSFER VENUE

On May 28, 1992, came on to be considered the defendants', International Insurance Company and United States Fire Insurance Company, Motion to Dismiss and/or Transfer Venue. The defendants ask the Court to dismiss or transfer this case pursuant to the "first-filed" rule or to transfer venue pursuant to 28 USC 1404(a). For the following reasons, the defendants' Motion to Dismiss and/or Transfer Venue is DENIED.

Both parties admit that both jurisdiction and venue is proper in this court.

The defendants argue that this case should be dismissed in light of the "first-filed" rule. This Court, after review of the memorandum submitted and the arguments heard, makes the following findings:

The "first-filed" rule should be applied absent special circumstances. Special circumstances have been found to include when a complaint is "filed in anticipation of a subsequent suit brought by the defendant to the first action." *The Amerada Petroleum Corp. v. Bettye M. Marshall*, 381 F.2d 661 (5th Cir. 1967).

This Court determines from the evidence presented, in the January 3, 1991 letter and the pleadings from the defendants, that the defendants herein did in fact file a declaratory judgment action in Louisiana in anticipation of a suit being filed by Babock & Wilcox herein. Therefore, for this and other reasons the Court finds that special circumstances do exist sufficient to avoid a wooden application of the "first filed" rule, and the Court finds that the "first filed" rule should not apply to this case.

The defendants argued, in the alternative, that this case should be transferred under the terms of 28 USC § 1404(a). This Court, after review of the memorandum and the arguments heard, makes the following finding:

Texas is the more convenient forum. This decision is based on the fact that this location is more convenient for the witnesses, particularly the non-party witnesses, and this is the location where the contract in question was executed as well as this is the plaintiff's choice of forum. Considering all of the factors, this Court determines that the more convenient forum is Texas and the motion for transfer is denied.

SIGNED this the 15th day of June, 1992.

/s/ J. Fisher
UNITED STATES DISTRICT JUDGE

APPENDIX E

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

92-4598

FILED- JUN 8 1992

In re:

INTERNATIONAL INSURANCE COMPANY AND
UNITED STATES FIRE INSURANCE COMPANY
Petitioner

International Insurance Company and United States Fire Insurance Company, defendants in Cause No. 1:91-CV-315, captioned as The Babcock & Wilcox Company, plaintiff, vs International Insurance Company and United States Fire Insurance Company, defendants, in the United States District Court for the Eastern District of Texas hereby petitions this Court to issue a Writ of Mandamus directing the District Judge below to stay, dismiss, or transfer the foregoing action presently pending before him to the United States District Court for the Eastern District of Louisiana.

Steven C. Barkley
LINDSAY, MOSES & BARKLEY
P.O. Box 3947
Beaumont, Texas 77704
(409) 838-4422

Laurence M. McHeffey
McELROY, DEUTSCH & MULVANEY
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P.O. Box 2075
Morristown, New Jersey 07962
(201) 993-8100

Attorneys for Petitioners

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing pleading was served upon Frances Blair Bethea, Esq., counsel for The Babcock & Wilcox Company, by mailing a copy of same by First Class United States mail, properly addressed and postage prepaid on the 9th day of June, 1992.

/s/ Laurence M. McHeffey
Laurence M. McHeffey

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CERTIFICATE OF INTERESTED PERSONS

Undersigned counsel of record for Petitioners, International Insurance Company and United States Fire Insurance Company, hereby certifies that the following list of persons or entities have an interest in the outcome of this case. This representation is made so that the members of this Court may evaluate possible disqualification or recusal.

1. International Insurance Company and United States Fire Insurance Company: Petitioners;

2. The Babcock & Wilcox Company: Respondent;

3. Steven C. Barkley of Moses, Barkley & Lockhart: Attorney for Petitioners;

4. Laurence M. McHeffey of McElroy, Deutsch & Mulvaney: Attorneys for Petitioners;

5. Frances Blair Bethea, Hubert Oxford, III, and Kip Kevin Lamb of Benchenstein, Oxford & Johnson: Attorneys for Respondent.

Respectfully submitted,

Moses, Barkley & Lockhart

BY :/s/ Steven C. Barkley

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STATEMENT OF JURISDICTION

This Court has jurisdiction over this appeal pursuant to 28 U.S.C. §1651. The Court below had jurisdiction pursuant to 28 U.S.C. §1332(a)(1), and 28 U.S.C. §§2201 and 2202.

A. STATEMENT OF THE CASE

(1) Course of the Proceedings and Disposition in the Court Below:

On March 15, 1991, Respondent The Babcock & Wilcox Company ("B&WC") filed a Complaint in the State Court of Texas, Jefferson County ("the State Action"), against Petitioners International Insurance Company ("International") and United States Fire Insurance Company ("U.S. Fire") seeking to recover amounts allegedly due under three insurance policies[1] for approximately 100 underlying asbestos related claims that arose in Texas.[2]

On or about April 9, 1991, International and U.S. Fire removed the State Action to the United States District Court for the Eastern District of Texas (the "Texas Action"). The State Action was filed in response to a suit filed by International and U.S. Fire in the United

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[1] International and U.S. Fire only participated in two of the three policies B&WC seeks coverage under in the Texas Action.

[2] Specifically, Paragraph V of Plaintiffs' "Original Complaint Petition" sought:

> [a]mounts due from INTERNATIONAL ... for settlement of asbestos claims total[ling] $1,137,305.79 as of February 28, 1991 [and] [a]mounts due from [U.S. Fire] total[ling] $444,364.52 as of February 28, 1991.

States District Court for the Eastern District of Louisiana (the "Louisiana Action") against McDermott, Inc. ("McDermott") and B&WC. After the State Action was removed to the United States District Court for the Eastern District of Texas, advancement of the Texas Action stalled for approximately one year as B&WC awaited this Court's resolution of an appeal by International and U.S. Fire from the Louisiana Action. That appeal concerned the "Service of Suit" clause's effect upon International and U.S. Fire's right to choose an appropriate forum. *See International Ins. Co., et al. v. McDermott Inc., et al*, No. 91-3398, slip op. (5th Cir. Feb. 18, 1992), *reh'g den.* March 19, 1992 and April 13, 1992.

Following this Court's denial of B&WC's second petition for rehearing, International and U.S. Fire filed a motion to Stay, Dismiss, or Transfer the Texas Action to the United States District Court for the Eastern District of Louisiana. In support of its motion, International and U.S. Fire argued that staying, dismissing, or transferring the Texas Action was appropriate because: 1) the Louisiana Action was filed prior to the Texas Action (e.g., the "first-filed" rule); 2) the issues raised by McDermott, McDermott International, Inc. ("MII") and B&WC (collectively referred to hereinafter as "B&WC") in the Texas Action are included in the universe of issues being litigated in the Louisiana Action;[3] 3) this Court has determined that the United States District Court for the Eastern District of Louisiana is an appropriate forum for this litigation; and 4) it makes absolutely no sense for two federal district courts

[3] In the Louisiana Action, International and U.S. Fire seek a judicial determination of their rights and obligations, if any, under 10 insurance

to be entertaining litigation involving the same parties, the same subject matter, and the same issues.

On May 28, 1992, the United States District Court for the Eastern District of Texas entertained oral argument and by Order dated May 28, 1992, denied International and U.S. Fire's motion. *See* Exhibit 1. Following oral argument by the parties, the District Judge stated he was denying International and U.S. Fire's motion because he had to balance the "first-filed" rule against the insured's right to choose a forum pursuant to the "Service of Suit" clause. *See* Barkley Affidavit, Exhibit 2. It is from this ruling that International and U.S. Fire petition for a Writ of Mandamus.

(2) Statement of the Facts Relevant to This Appeal:

(a) Facts Leading to the Present Dispute

Between 1981 and 1986, International and U.S. Fire "participated in" at least ten (10) policies of umbrella and excess liability insurance issued to McDermott and McDermott's subsidiaries. In 1989, McDermott requested coverage under those insurance policies for approximately 20,000 asbestos related lawsuits filed against McDermott and its subsidiaries, including B&WC. Following this request for coverage, from August 1989 to December 1990, the parties engaged in negotiations concerning International and U.S. Fire's obligation(s), if any, under the 10

Footnote 3 continued.

policies, not 2, for approximately 20,000 asbestos related claims filed throughout the courts of the United States, not 100.

policies. In December 1990, after a year and a half of negotiating, it became evident the parties could not agree on how claims would be allocated or who was responsible for uninsured periods. Thus, settlement negotiations stalled.

By letter dated January 2, 1991, International and U.S. Fire once again attempted to settle the dispute between the parties. International and U.S. Fire's good faith effort to settle the matter was answered by a letter dated January 3, 1991 in which McDermott rejected International and U.S. Fire's settlement offer and threatening to "institute proceedings to collect [amounts allegedly due] ... if they are not paid within 30 days from the date of this letter"—a deadline that came and went without McDermott filing suit.

(b) The Present Litigation

Presently, there are two actions pending between insurers International and U.S. Fire and insureds McDermott and McDermott's subsidiary, B&WC. The first action was filed by International and U.S. Fire in the United States District Court for the Eastern District of Louisiana ("Louisiana Action"). The second action was filed by McDermott, MII, and B&WC in the state court of Texas, Jefferson County ("State Action"). The State Action was subsequently removed to the United States District Court for the Eastern District of Texas ("Texas Action").[4] Both cases are complex and will require resolution of many complicated legal and factual issues including, but not limited to, interpretation and application of all relevant terms, conditions, definitions, and exclusions of the insurance policies

[4]McDermott and MII were voluntarily dismissed from the Texas Action by Ex Parte application.

at issue. Assuming *arguendo* that coverage is found, the court will be requested to resolve how claims are to be paid under all policies.

1) The Louisiana Action

In the Louisiana Action,[5] International and U.S. Fire seek a declaratory judgment of *all* rights and obligations, if any, for *all* asbestos related claims filed against McDermott and its subsidiaries under 10 insurance policies issued to McDermott, B&WC, and 60 of McDermott's subsidiaries. Pled to fully address all policy defenses, the Louisiana Action will require extensive discovery to determine when McDermott, MII, and B&WC (hereinafter collectively "B&WC") knew their products could cause asbestos related injuries, whether B&WC expected or intended asbestos related injuries, and whether coverage is excluded by the express terms, conditions, definitions, and exclusions of the policies.[6] If coverage is found, the court must then determine how claims are to be paid under the policies.[7]

Substantively, the Louisiana Action will end all litigation between the parties because it addresses the entire universe of disputed issues between the named insureds and the insurers, all policies at issue, and each and every one of the thousands of asbestos related claims filed

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[5] McDermott's corporate headquarters are located in New Orleans, Louisiana.

[6] This is merely a partial list of all factual and legal inquiries that resolution of this suit may require.

[7] B&WC takes the position that International and U.S. Fire must pay for any underlying claim that falls within its coverage period. B&WC also asserts that International and U.S. Fire must pay for uninsured periods of time as well as satisfy the obligations of any insolvent insurers.

against B&WC.

Procedurally, the Louisiana Action is well underway. B&WC's assertion below that "[t]here has been no activity in the Louisiana Action ..." is absolutely false. *See* Babcock & Wilcox's Response To The Motion To Dismiss and/or Transfer Venue at 11 (hereinafter "Response Brief"), Exhibit 4.

Finally, contrary to B&WC's assertions below, the Louisiana Action was not filed in reaction to McDermott's threat of litigation. Review of McDermott's January 3, 1991 letter (*see* Exhibit to Response Brief) clearly shows that same was written in response to International and U.S. Fire's letter of January 2, 1991 which attempted to settle the matter (after a year and a half of negotiations) with a very reasonable offer.[8] Nearly two months after International and U.S. Fire received McDermott's January 3, 1991 letter, during which time B&WC failed to act, the carriers were forced to file a declaratory judgment action to determine their obligations, if any, under the 10 (not 3) insurance policies issued to McDermott and its subsidiaries. Further, the Louisiana Action was filed in McDermott's "home" state—McDermott's corporate headquarters is located in Louisiana.[9]

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[8] References to B&WC's introduction of this correspondence shall not waive any evidentiary objections defendants may have to the introduction of this and similar correspondence, which was exchanged in the course of settlement negotiations, in any hearing on the merits.

[9] In the proceedings below, B&WC argued that International and U.S. Fire forum shopped and raced to the courthouse. This assertion is meritless. Louisiana is McDermott's home state, its headquarters is located in Louisiana, its corporate personnel are in Louisiana, and the economic benefits McDermott imparts (employment, taxes, etc.) are received in Louisiana. Furthermore, Interntional and U.S. Fire engaged in negotiations with B&WC for over a year and a half prior to filing the

2) The Texas Action

In the Texas Action, McDermott, B&WC, and MII filed suit to recover "[a]mounts due from INTERNATIONAL . . . for settlement of asbestos claims total $1,137,305.79 as of February 28, 1991 . . . . [and] [a]mounts due from UNITED STATES FIRE INSURANCE COMPANY total $444,364.52 as of February 28, 1991." *See* Complaint, Count V. McDermott's Complaint alleges that these sums are due under three insurance policies, only two of which were issued by International or U.S. Fire. *See* footnotes 1 and 2 of B&WC's Response Brief, Exhibit 4. Finally, the asbestos related claims to which the Complaint refers are only a fraction of the thousands of claims filed against McDermott and its subsidiaries and are only for asbestos related claims asserted against B&WC *in Texas.*[10]

Substantively, the Texas Action cannot end the litigation between the parties because it does not involve all policies nor does it involve all of the thousands of asbestos related claims filed against McDermott and its subsidiaries. Thus, the Texas Action will only prolong the litigation between the parties.

Procedurally, the Texas Action is in its infancy. B&WC's assertion below that "[t]here has been no activity" would be better stated with regard to the Texas Action

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Footnote 9 continued.

Louisiana Action, attempted many times throughout that time to settle the matter, and waited nearly two months after receiving B&WC's January 3, 1991 threat of suit before it filed the Louisiana Action in McDermott's home state. Thus, International and U.S. Fire did not "race to the courthouse."

[10] B&WC has been sued for asbestos related injuries in nearly every state.

since B&WC did nothing to advance the Texas Action prior to this Court's denial of its second petition for rehearing on April 13, 1992 in the Louisiana Action. Since April 13, 1992, B&WC has partially responded to discovery propounded upon it 5 months previously[11] and on or about April 29, 1992, propounded discovery upon International and U.S. Fire.

3) This Court's Previous Role

The Louisiana Action has already been before this Court. Shortly after the Louisiana Action was filed, B&WC filed a motion to Stay, Dismiss, or Transfer based on the "Service of Suit" clause contained within some of the insurance policies at issue. The United States District Court for the Eastern District of Louisiana granted McDermott's motion and International and U.S. Fire appealed. By opinion dated February 24, 1992, this Court reversed and remanded holding the "Service of Suit" clause did not prevent an insurer from filing its own declaratory judgment action in an appropriate forum. This Court also stated that the District Court in Louisiana and the Court in Texas should avoid duplicative actions and take appropriate steps to avoid trying the same case. *International Ins. Co., et al, v. McDermott Inc., et al,* No. 91-3398, slip op., fn. 1. (5th Cir. Feb. 18, 1992), *reh'g den.* March 19, 1992 and April 13, 1992. In March, 1992, McDermott filed a petition for rehearing of this Court's February 24, 1992 decision. While McDermott's first petition for rehearing was pending, this Court modified its February 24, 1992 ruling and reissued same on March 9, 1992. Shortly thereafter, on March 19, 1992 this Court denied McDermott's first petition for rehearing. On March 23, 1992, McDermott filed a

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[11] B&WC's entire production to date consists of a single box of documents in response to 87 interrogatories and 50 requests for production.

second petition for rehearing, this time challenging this Court's March 9, 1992 ruling. On April 13, 1992, this Court denied McDermott's second petition for rehearing.

4) B&WC and its Other Insurers

In support of their motion, International and U.S. Fire brought to the lower Court's attention B&WC's briefs from a coverage action it commenced in the United States District Court for the Eastern District of Ohio, Eastern Division[12] against numerous other insurers[13] (hereinafter the "Ohio Action").

Filed on May 22, 1991, the Ohio Action was instituted two months after the Texas Action.[14] In the Ohio Action, B&WC seeks a declaratory judgment concerning its rights, if any, under an insurance policy issued for the 1979-80 policy period.[15] B&WC also seeks coverage for the

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[12] The Ohio Action concerns B&WC's rights under a $17.5 million second layer excess umbrella policy (the 'Subscribers policy' and the 'Adams & Porter policy') in effect during the 1979-80 policy year. The Texas Action involves two policies, A&P/H 9581 covering the policy period 4/1/81 to 4/1/82 and policy number A&PH 10073 covering the policy period 4/1/82 to 4/1/83.

[13] Neither International nor U.S. Fire are parties to the Ohio Action.

[14] International and U.S. Fire filed the Louisiana Action on or about February 28, 1991. B&WC filed the Texas Action on or about March 15, 1991.

[15] B&WC sued insurers Arkwright Mutual Ins. Co. ("Arkwright"); St. Paul Mercury Ins. Co. ("St. Paul"); Citadel Ins. Co. ("Citadel"); Travelers Indemnity Co. ("Travelers"); American International Marine Agency ("American"); Allianz Ins. Co. ("Allianz"); Insurance Co. of North America ("INA"); and Carl Vaughn Gibbs, individually and on behalf of all subscribing underwriters at Lloyd's of London ("London Market").

same asbestos related claims that are at issue in the Louisiana and Texas Actions. On July 2, 1991, insurers St. Paul, Arkwright, and Allianz filed an action in Louisiana state court seeking a determination of their rights under the same policy. Thus, the Ohio Action, like the Texas and Louisiana Actions, involves two competing suits filed in separate jurisdictions both seeking a determination of the parties' rights relating to thousands of asbestos related claims filed against B&WC.

International and U.S. Fire brought these choice of law briefs to the lower Court's attention to show that B&WC has advanced positions inconsistent with those advanced in the court below. Specifically, in the Texas Action, B&WC argues the courts of Texas should interpret the policies. On the other hand, in the Ohio Action, B&WC emphatically advocates that the courts of Ohio, not Texas, should interpret the policies at issue.[16] In support of its position, B&WC filed a 16 page brief describing all of B&WC's contacts with Ohio, submitted five affidavits of various corporate personnel attesting to B&WC's Ohio contacts, and submitted an elaborate report entitled: "An Analysis to Determine Which State has the Most Significant Economic Relationship with the Babcock & Wilcox Company," prepared by economic consultant Thomas Joseph Coyne, Ph.D. The report concludes that B&WC has most significant contacts with Ohio. The brief also analyzes B&WC's contacts with various states including Louisiana. Throughout the discussion, however, very few contacts with Texas are mentioned.

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[16] In footnote 2 of B&WC's Choice of Law Motion, B&WC admits "[n]either Babcock & Wilcox nor any of the other McDermott subsidiaries or affiliates took part in the negotiation of any of the policies in the 1979-80 insurance program. Thus, it appears that the policies at issue in both the Ohio and Texas Actions were acquired by McDermott, Inc. from its headquarters in Louisiana.

These positions are inconsistent and lend support to International and U.S. Fire's position that the United States District Court for the Eastern District of Louisiana is the most appropriate forum to adjudicate the parties' rights and obligations under the policies.

B. STATEMENT OF THE ISSUE

The issue presented by this Petition for a Writ of Mandamus is whether the Court below erred in failing to stay, dismiss, or transfer the Texas Action to the United States District Court for the Eastern District of Louisiana pursuant to the "first-filed" rule.

C. RELIEF SOUGHT

International and U.S. Fire seek an Order directing the District Judge below to stay, dismiss, or transfer the Texas Action to the United States District Court for the Eastern District of Louisiana, the court where the first action between the parties was filed.

D. REASONS WHY WRIT SHOULD ISSUE

The District Judge abused his discretion when he misapplied the law regarding the "first-filed" rule. The "first-filed" rule dictates that the Texas Action should be stayed, dismissed, or preferably, transferred to the United States District Court for the Eastern District of Louisiana ("Louisiana Action"). The Court's failure to stay, dismiss, or transfer the Texas Action in favor of the Louisiana Action is clearly erroneous as it is contrary to this Court's ruling in *West Gulf Maritime Ass'n v. ILA Deep Sea Local 24, et al.*, 751 F.2d 721, 729 (5th Cir. 1985) concerning the "first-filed" rule, will severely prejudice International and U.S. Fire, result in piecemeal litigation, and not promote

judicial economy.

Further, the lower Court's stated reason for denying International and U.S. Fire's motion—balancing the "first-filed" rule against the insured's right to choose its own forum pursuant to the "Service of Suit" clause—is contrary to this Court's recent interpretation of the "Service of Suit" clause in *International Ins. Co., et al, v. McDermott Inc., et al,* No. 91-3398, slip op. (5th Cir. Feb. 18, 1992), *reh'g den.* March 19, 1992 and April 13, 1992.

Finally, if the lower Court's decision is not reversed, two federal courts will remain seized with jurisdiction over the same parties, same subject matter, and nearly the same issues—the Louisiana Action will address all issues raised in the Texas Action, not visa versa [sic]. This is precisely the situation this Court sought to avoid in footnote one of the above reference opinion.

E. EXCERPTED RECORD

The only "written" record of the lower Court's opinion is an Order dated May 28, 1992 attached as Exhibit 1.

CONCLUSION

For the foregoing reasons, International and U.S. Fire respectfully request this Court to issue a Writ of Mandamus directing the United States District Court for the Eastern District of Texas to stay, dismiss, or preferably, transfer the Texas Action to the United States District Court for the Eastern District of Louisiana.

Respectfully submitted,

LINDSAY, MOSES & BARKLEY
Attorneys for Petitioners
International Insurance
Company and United States
Fire Insurance Company

By: /s/ Steven C. Barkley
Steven C. Barkley

OF COUNSEL:

McELROY, DEUTSCH & MULVANEY
Attorneys for Petitioners
International Insurance
Company and United States
Fire Insurance Company

By: /s/ Laurence M. McHeffey
Laurence M. McHeffey

Dated: June 5, 1992

CERTIFICATE OF SERVICE

I certify that I have mailed by U.S. mail a copy of this Writ and Exhibits to all counsel of record and Judge Joe Fisher, U.S. D. Ct. E.D. Texas, this 8th day of June, 1992.

/s/ Laurence M. McHeffey

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Exhibit 1	Order of the Lower Court dated May 28, 1992 denying Petitioner's Motion to Stay, Dismiss, and/or Transfer the Texas Action to the United States District Court for the Eastern District of Louisiana;
Exhibit 2	Affidavit of Steven C. Barkley, Esq.;
Exhibit 3	Petitioner's Motion to Stay, Dismiss, and/or Transfer the Texas Action to the United States District Court for the Eastern District of Louisiana;
Exhibit 4	B&WC's Opposition to Petitioner's Motion to Stay, Dismiss, and/or Transfer the Texas Action to the United States District Court for the Eastern District of Louisiana;
Exhibit 5	Petitioner's Reply to B&WC's Opposition;
Exhibit 6	Petitioner's Supplement to its Motion to Stay, Dismiss, and/or Transfer the Texas Action to the United States District Court for the Eastern District of Louisiana;
Exhibit 7	B&WC's Response to Petitioner's Supplemental Filing;

Exhibit 8	B&WC's "Memorandum in Opposition to Defendants' Motion to Dismiss," filed in the Ohio Action. This brief was an attachment to Exhibit 6;
Exhibit 9	B&WC's "Motion In Limine to Determine Law Applicable to Subscriber Policy," filed in the Ohio Action. This brief was an attachment to Exhibit 6.

* Only Exhibit 2 is attached to this writ application.

AFFIDAVIT

THE STATE OF TEXAS §

COUNTY OF JEFFERSON §

BEFORE ME, the undersigned authority, on this day personally appeared STEVEN C. BARKLEY, known to me to be a credible person of lawful age, and qualified in all respects and authorized to make this affidavit, and upon his oath deposes and says:

"My name is Steven C. Barkley. I am over the age of eighteen (18) years, and am the attorney of record for Defendants International Insurance Company and United States Fire Insurance Company in this case.

"On May 28, 1992, I appeared on behalf of my clients International Insurance Company and United States Fire Insurance Company in the United States District Court for the Eastern District of Texas for a hearing on Defendants' Motion to Stay, Dismiss and/or Transfer the present action to the United States District Court for the Eastern District of Louisiana. The hearing was held in chambers and no court reporter was present.

"The Honorable Court overruled Defendants' Motion to Transfer. The Court stated, to the best of my memory, that it was overruling the Motion to Transfer because it felt that a balancing test should be applied between Defendants' right to have the case transferred to Louisiana under the "first file" rule and Plaintiff's right to choice of jurisdiction under the "service of suit clause" in the insurance policies involved in this lawsuit. The Court stated it was applying this test in denying Defendants' Motion. To the best of my memory, the District Court did not

state any other reason for denying Defendants' Motion.

"Further, affiant sayeth not."

/s/ Steven C. Barkley
STEVEN C. BARKLEY

SWORN TO AND SUBSCRIBED TO by the said Steven C. Barkley, before me, the undersigned notary public, witness my hand and seal of office, this the 5th day of June, 1992.

/s/ Myrtle Locke
NOTARY PUBLIC, STATE OF TEXAS

MYRTLE LOCKE
MY COMMISSION EXPIRES
JUNE 30, 1995

APPENDIX F

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

NO. 92-4598

Received
JUN 16 1992

In re:

INTERNATIONAL INSURANCE COMPANY AND
UNITED STATES FIRE INSURANCE COMPANY

RESPONSE OF THE BABCOCK &
WILCOX COMPANY TO THE PETITION
FOR WRIT OF MANDAMUS FILED BY
INTERNATIONAL INSURANCE COMPANY AND
UNITED STATES FIRE INSURANCE COMPANY

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CERTIFICATE OF INTERESTED PARTIES

The Undersigned counsel of record certify that the following listed parties have or may have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

A. The Babcock & Wilcox Company: Plaintiff-Respondent;

B. Hubert Oxford, III, Kip K. Lamb, and Frances B. Bethea of Beckenstein, Oxford & Johnson: Attorneys for Plaintiff-Respondent;

C. Rockne L. Moseley of Lea, Plavnicky & Moseley: Attorney for Plaintiff-Respondent;

D. International Insurance Company and The United States Fire Insurance Company: Defendants-Petitioners;

E. Laurence M. McHeffey, Gary S. Kull, and Moira E. O'Connell of McElroy, Deutsch & Mulvaney: Attorneys for Defendants-Petitioners;

F. Steven C. Barkley of Lindsay, Moses & Barkley: Attorney for Defendants-Petitioners.

Respectfully submitted:

/s/ Rockne L. Moseley

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STATEMENT OF THE ISSUE

Whether the district court abused its discretion or committed "usurpation of judicial power" when it denied application of the first-filed rule after the plaintiff in the first-filed case clearly "raced to the courthouse" and filed first in anticipation of the true plaintiff filing suit.

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

No.92-4598

In re:

INTERNATIONAL INSURANCE COMPANY AND UNITED STATES FIRE INSURANCE COMPANY

The Babcock & Wilcox Company, at the request of the Fifth Circut Court of Appeals, responds to the Petition for Issuance of a Writ of Mandamus.

JURISDICTION

The petitioners seek extraordinary review, pursuant to 28 U.S.C. § 1651, of the Eastern District of Texas, Beaumont Division District Court's ruling denying a Motion to Transfer and/or Dismiss.

STATEMENT OF THE CASE

A. *COURSE OF PROCEEDINGS BELOW:*

1. Eastern District of Texas, Beaumont Division.

On March 15, 1991, McDermott International, McDermott Incorporated and The Babcock & Wilcox Company (hereinafter "Babcock & Wilcox") filed suit in Jefferson Country Texas State Court against International Insurance Company ("International") and United States Fire Insurance Company ("U.S. Fire"). The Texas State Court Action was removed to the Eastern District of Texas,

Beaumont Division ("The Texas Action") by the insurance companies pursuant to 28 U.S.C. § 1332(a)(1). Subsequently, McDermott International and McDermott Incorporated were voluntarily dismissed from the suit.

The insurance companies filed a Motion to transfer and/or Dismiss the Texas Action. On May 28, 1992, the District Court held a hearing on that motion. After arguments were conducted by both parties, the District Court, after weighing all of the factors, denied the Motion to Dismiss and/or Transfer Venue. The insurance companies have now petitioned this Court for a Writ of Mandamus ordering the District Court to grant their motion.

2. Eastern District of Louisiana.

On February 28, 1991, the insurance companies filed an declaratory judgment in the Eastern District of Louisiana requesting the Court to declare their rights and obligations to McDermott and Babcock & Wilcox under the same insurance policies at issue in the Beaumont action.[1] McDermott and Babcock & Wilcox filed a Motion to Stay, Transfer or Dismiss this case to the Eastern District of Texas, Beaumont Division. The District Court granted the Motion to Dismiss and the insurance companies appealed the dismissal to this Court. This Court reversed and remanded the district court's ruling and a petition for rehearing en banc was denied. This case is presently pending before the United States Supreme

[1] Although there are other upper layer excess insurance policies issued to McDermott and Babcock & Wilcox by International and U.S. Fire, there are no claims against those policies. The insurance companies have listed these policies as part of the declaratory judgment, even though there is no controversy about these policies and they are irrelevant to any consideration of the facts in this matter.

Court, No. 91-1976.[2]

B. *Statement of Facts*

International, U.S. Fire, and other insurers (not part of this suit and paying claims without need for lawsuits), issued to McDermott and Babcock & Wilcox umbrella liability insurance policies having effective dates from April 1, 1981 to April 1, 1992, and April 1, 1985. The policies provided indemnification of the insureds for all sums which the insureds are obliged to pay by reason of liability, imposed by law or assumed under any contract or agreement, for damages on account of personal injury or property damage. The policies all included a forum selection clause.

Numerous claims for personal injury arising from

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[2] In Ohio, Babcock & Wilcox has a completely separate and unrelated action against several insurance companies: Citadel Insurance Company, Travelers Indemnity Company, Insurance Company of North America, Underwriters at Lloyds, London, Arkwright-Boston Manufacturing Mutual Insurance Company, Allianz Insurance Company, American International Marine Agency, American Home Insurance Company, St. Paul Mercury Insurance Company regarding an excess policy for the 1979-1980 policy year. International and U.S. Fire are not subscribers to the policy at issue in the Ohio Action.

Petitioners, in their petition, indicate that Babcock & Wilcox takes inconsistent positions with those in the Beaumont court. However, International and U.S. Fire failed to inform this court that they are comparing: a) different policy periods; b) different policies; c) different subscribers; d) different issues; e) different motions. Pending before the Ohio Court is a choice of law motion, while in the Texas the more convenient forum, *i.e.* which venue, is at issue. Consideration of the Ohio action in this litigation is improper and is further evidence of the insurers desire to obfuscate the issues with regard to the issue in this writ of mandamus. That Ohio litigation is no more germane to this case than the hundreds of cases in which International and U.S. Fire (and their parent "Crum & Forster") are litigating across the country in different forums.

exposure to asbestos have been asserted against Babcock & Wilcox.[3] All insurers subscribing to these policies of insurance except International and U.S. Fire have paid claims. McDermott and Babcock & Wilcox made demand for payment to International and U.S. Fire, through their counsel, for asbestos related claims. Counsel for Babcock & Wilcox clearly stated that if payment was not received that the insured would file suit.[4] International and U.S. Fire did not make payment nor respond to the final demand but rather they filed a suit for Declaratory Judgment in the United States District Court for the Eastern District of Louisiana in anticipation of Babcock & Wilcox filing suit.

Babcock & Wilcox, as promised, filed suit in the State District Court in Jefferson County, Texas, the forum of their choice.

LAW AND ARGUMENT

1. THE FACTS STATED BY THE INSURANCE COMPANIES ARE MISLEADING, IRRELEVANT TO THE ISSUE, AND CALCULATED TO PREJUDICE THE COURT.

The sole issue, according to the Insurance Companies, in this petition for writ of mandamus is:

> ...whether the court below erred in failing to stay, dismiss or transfer the Texas Action to the United States District Court for the Eastern

---

[3] The Texas Action addresses all asbestos related claims against Babcock & Wilcox, not just the claims pending in the Beaumont area. The insurance companies assertions to the contrary are incorrect.

[4] Exhibit "A", January 3, 1991 letter from Babcock & Wilcox to the insurance companies regarding the demand for payment of claims.

District of Louisiana pursuant to the "first-filed" rule.
(Statement of the Issue, P. 15, Brief of Petitioner.)

The petitioners do not dispute that the United States District Court for the Eastern District of Texas, Beaumont Division, has jurisdiction over all the parties and is a proper venue for these issues. The petitioners do not dispute the court's ruling denying the motion to transfer venue pursuant to 28 U.S.C. § 1404(a). Therefore, all of these matters are not at issue and are not reviewable.

The only issue before this court is the district court's finding that the first-filed rule does not apply to this case. The statements of facts in the petition for writ of mandamus by the insurance companies is misleading and calculated to unfairly prejudice this court.[5] Most of the facts stated by the insurance companies are irrelevant to the issue of the first-filed rule and are a mere gratuitous, self-serving mishmash of misstatements and omissions which should be disregarded, *in toto*, by this court.

The sole facts that should be reviewed by this court on this issue are as follows:

1) Insurance companies and Babcock & Wilcox were engaged in negotiations concerning payment of claims.

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[5] An example of these prejudicial misstatements include: 1) the insurance companies' misstate Judge Fisher's reasons for denying the motion to dismiss. (See Affidavit of Frances B. Bethea, Exhibit "B"); 2) the insurance companies incorrectly assert that only one hundred claims will be litigated in Beaumont; 3) the insurance companies assert that Babcock & Wilcox has adopted inconsistent positions in the Texas Action and the Ohio litigation even though the insurance companies are aware that these cases are comparing different issues, *i.e.* Texas (Venue) and Ohio (Choice of Law).

2) Babcock & Wilcox in a letter, demanded full payment or they would be forced to institute suit.

3) In response, the insurance companies "raced to the courthouse" and filed a declaratory judgment in anticipation of a suit filed by Babcock & Wilcox as stated in the letter.

4) Babcock & Wilcox shortly thereafter filed suit in State Court in Jefferson County, Texas. The insurance companies removed the suit to the Eastern District of Texas, Beaumont Division.

5) The district court, on motion of the insurance companies, considered application of the "first-filed" rule and/or a transfer pursuant to 28 U.S.C. § 1404(a) and denied same.

6) The district court declined to apply the "first-filed" rule based on its finding that the insurance companies filed suit in anticipation of the Babcock & Wilcox suit, that the "race to the courthouse" created inequities, and other reasons.

It is submitted that the Ohio litigation, the facts and circumstances of the status of discovery, the number of claims, or of the insurance companies lack of "good faith" is simply not relevant to this court and is best left to the district court. If this court should desire consider these facts, the respondents request adequate time to present evidence to the court to demonstrate the nature and quality of the petitioners' misstatements and material omissions.

2. A PETITION FOR A WRIT OF MANDAMUS IS AN EXTRAORDINARY PROCESS WHICH HAS BEEN ABUSED BY THE INSURANCE COMPANIES BY FILING A MISLEADING AND SELF-SERVING AFFIDAVIT IN SUPPORT OF THEIR PETITION.

The petitioners request a Writ of Mandamus be issued to the district court dismissing this action. This Court, as well as the United States Supreme Court, recognize that "Mandamus is an extraordinary remedy, not to be granted lightly." *In Re Ramu Corp.*, 903 F.2d 312, 317-18 (5th Cir. 1990), citing *Ex Parte Fahey*, 332 U.S. 258, 259-60, 67 S.Ct. 1558, 1559, 91 L.Ed. 2041 (1947); *Kerr v. United States District Court*, 426 U.S. 394, 402-03, 96 S.Ct. 2119, 2123-24, 48 L.Ed.2d 725 (1976). "It is available only where these is a clear and indisputable abuse of discretion or usurpation of judicial power by the trial court." *In Re Ramu, Id.*, at 318. (Citations omitted.) Such "abuse" and "usurpation" by the district court is not present and such charges are unsupported and false.

The petitioners participated in a hearing before the district court judge and now file an affidavit purporting to represent the findings of the district court. **THE AFFIDAVIT FILED BY COUNSEL FOR PETITIONERS DOES NOT REPRESENT THE RULING OF THE DISTRICT COURT AND UNFAIRLY AND IMPROPERLY PRESENTS THE ISSUE TO THIS COURT.**

The following facts are necessary for consideration of any ruling by this court. First, before commencement of the hearing counsel for petitioners was specifically asked whether this hearing should be held in chambers. Counsel for petitioners was specifically told that if a record was necessary or a court reporter needed to transcribe the

arguments or findings then the hearing need be held in open court. Petitioner for the insurance companies specifically stated that the matter need *not* be heard in court. (Exhibit "B", Affidavit of Frances B. Bethea.) Secondly, after the courts ruling, counsel for the insurance companies did *not* ask the court to state his reasons and did *not* ask the court to issue written reasons for the court's decision. (Exhibit "B", Affidavit of Frances B. Bethea.) **IT IS SUBMITTED TO THIS COURT THAT AN "AMBUSH" OF THE DISTRICT COURT BY A SELF-SERVING AFFIDAVIT IS AN ABUSE OF THE WRIT PROCESS AND IMPROPER.** In view of the fact that a writ should not issue unless there is an "indisputable abuse" or "usurpation of judicial power" by the district judge, a petition based upon such an affidavit is blatantly abusive. This is especially abusive in light of the failure of the petitioners to request a transcript or request reasons from the court. This matter should be dismissed summarily with admonition against such tactics.

3. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION AND PROPERLY DECLINED TO APPLY THE "FIRST-FILED" RULE BECAUSE THE INSURANCE COMPANIES FILED SUIT IN ANTICIPATION OF A SUIT BY THE INSURED.

Petitioners base their entire legal argument on a mandatory application of a rule in which this Court has stated the following:

> A Court *may*...in its discretion dismiss a declaratory judgment or injunctive suit if the same issue is pending in litigation elsewhere.

West Gulf Maritime Ass'n v. ILA Deep Sea Local 24, 751 F.2d 721 (1985). (Emphasis added.)

Therefore, this Court in *West Gulf Marine*, stated that imposition of the "first-filed" rule is discretionary and may be applied to determine whether a *declaratory judgment* action should proceed. First, the suit in question is not a declaratory judgment action, but an action for breach of contract. Second, even when this Court balances whether a suit should be dismissed pursuant to the first-filed rule, it specifies that the district court should consider a variety of factors to determine if the "first-file" rule should apply, which include:

> 1) the declaratory complaint was filed in anticipation of another suit and is being used for the purpose of forum shopping; or
>
> 2) because of the possible inequities of permitting the plaintiff to gain precedence in time and forum; or
>
> 3) because of inconvenience to the parties or the witnesses. *Rowan Companies, Inc. v. Griffin*, 876 F.2d 26, 29 (5th Cir. 1989).

Specifically, the Fifth Circuit Court of Appeals has held that a complaint filed in anticipation of a subsequent suit is a factor sufficient to avoid the application of the "first-filed" rule. *The Amerada v. Marshall*, 381 F.2d 661 (5th Cir. 1967) cert denied 389 U.S. 1039, 88 S.Ct. 777, 19 L.Ed.2d 829 (1968). Additionally, this Court in *Mission Insurance Company v. Puritan Fashions Corp.*, 706 F.2d 599 (5th Cir. 1983) upheld the district court's dismissal of a "first-filed" suit when the Court determined that the "first-filed" suit was filed in anticipation of the second filed suit.

The district court factually determined, after review of the pleadings and arguments by counsel, that the "first-filed" suit was anticipatory in nature. The court weighed

that factor, among others, and denied the dismissal.[6]

4. THE RULING OF THE DISTRICT COURT IS CONSISTENT WITH THIS COURT'S RULING IN *INTERNATIONAL INSURANCE COMPANY V. MCDERMOTT INCORPORATED.*

Finally, petitioners allege that this Court, in its earlier opinion in *International Insurance Company v. McDermott Incorporated*, 956 F.2d 93 (5th Cir. 1992), "sought to avoid this situation (Petitioners Brief, p. 18).

In that case, this Court was presented an issue with regard to the service of suit clause. In that opinion the other panel acknowledge the existence Texas Action [sic] and stated:

> Although, it seems obvious that there is or will be some overlap between the federal and state actions between McDermott and the insurers, it is not clear from the record in this case that there is in fact any such overlap. If it develops that there is such an overlap — if the same issues are being litigated in two different courts — then that problem may be dealt with by reference to the usual panoply of rules governing judicial economy, the integrity of judgments, comity between federal and state courts, and the like. This court has no warrant, and no wish, to upset those rules on no greater basis than the construction of a single clause in a group of contracts of insurance. *Inter-*

---

[6] After the court determined that the case should not be dismissed pursuant to the "first-filed" rule it looked to 28 U.S.C. § 1404(a), and determined that Texas was the more convenient forum. While the ruling on 28 U.S.C. § 1404(a) has not been raised in this petition, the analysis of the convenience of parties and witnesses is certainly applicable to the analysis of the "first-filed" rule.

> *national Insurance Company v. McDermott Incorporated*, 956 F.2d 93, 96 (5th Cir. 1992).

Furthermore, the Court stated in a footnote that:

> Thus, as International and U.S. Fire concede, they must appear in the Texas court in which McDermott has filed its action, and must submit to the jurisdiction of that court. The Service of Suit clause requires as much. If the issues in that case prove to be duplicative of issues in the federal action, then it will be up to the state[7] court to decide what action to take to avoid trying the same case in two courts.

Id., at 96 (fn. 1).

Therefore, this Court, in its previous opinion, stated that the "state" or "trial" court should decide what action to take regarding the existence of the two cases. The trial court, the District Court for the Eastern District of Texas, balancing all the panoply of rules covering judicial economy and integrity of judgments, decided to proceed with this matter. That the trial court may proceed was as provided in *International*. That case should now proceed and since the insurers agreed to "comply will all requirements necessary to give such court jurisidiction and all matters arising hereunder *shall be determined in accordance with the law and practice of such court*"[8] as

---

[7] The Texas Action was filed in state court and removed to federal court by International and U.S. Fire.

[8] The service of suit clause included in this policy reads as follows:

> It is agreed that in the event of the failure of Underwriters hereon to pay any amount claimed to be due hereunder, Underwriters hereon, at the request of the assured, will submit to the jurisdiction of any court of competent jurisdiction

provided in the service of suit clause, the insurers should not be heard to complain. The decision by the district court is not in conflict with the Fifth Circuit's earlier opinion and should not be disturbed in such a tawdry fashion.

Footnote 8 continued.

> within the United States and will comply with all requirements necessary to give such court jurisidiction and *all matters arising hereunder shall be determined in accordance with the law and practice of such court.* (Emphasis added.)

CONCLUSION

Petitioners have failed to establish any abuse of discretion on the part of the trial court, therefore, their Petition for Writ of Mandamus should be denied.

Respectfully submitted:

/s/ Rockne L. Moseley
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Attorneys for Respondents

CERTIFICATE OF SERVICE

I do hereby certify that a copy of the foregoing Brief have been served on all counsel of record by telefaxing, hand delivery and/or by placing same in the United States mail, properly addressed and postage prepaid on this 16th day of June, 1992.

/s/ Rockne L. Moseley

McDERMOTT
Incorporated

1010 Common Street
P.O. Box 60035
New Orleans, Louisiana 70160
(504) 587-4411

January 3, 1991

JAN 7 1991

Mr. Gary Kull
McElroy, Deutsch & Mulvaney
P.O. Box 2075
Morristown, N.J. 07962-2075

RE: McDermott/B&W Excess Coverage

Dear Mr. Kull:

The position taken by U.S. Fire and International Insurance Co. as outlined in your January 2 letter is unacceptable. Our present method of allocation of claims to excess policies is in conformity with existing law. All other excess insurers presently affected have executed the Agreement, settled or are paying as billed in accordance with the method of allocation set forth in the Agreement with the exception of one company which is under supervision. The supervising authority has not made a decision.

Through November, U.S. Fire and International Insurance Company have incurred, and have been billed for, their por-

EXHIBIT "A"

tion of asbestos related claims which total $392,169.50 for U.S.Fire and $1,004,334.22 for International Insurance Co. It is the intention of B&W to institute proceedings to collect these amounts if they are not paid within 30 days from the date of this letter. B&W will further seek interest, costs, legal expenses and whatever penalties are available to it. The collection proceedings should resolve any coverage questions. Future billings must be paid when due.

You will receive no further demand or notice.

As per your request, I attach a copy of CIGNA's primary policy for 1982-83 which I understand was unchanged in any material fashion from 1981 to 1986. This policy is being provided to you on a confidential basis and should not be copied or distributed except to those persons who have a need to know the contents thereof because of this controversy.

I have no specific documentation of the exhaustion of the CIGNA limits. I can supply you with a certification that all limits have been expended. If you need such a certification, please advise but I can assure you the limits have been exhausted for well over a year.

A listing of all claims paid would comprise a list of over 60,000 claims which is an undue burden. Our claims files have been periodically audited by Mendes and Mount and found acceptable. You are welcome to conduct an independent audit at the offices of Worldwide Services in Houston, however I suggest before you expend countless hours pouring over thousands of files, you contact Tom Quinn of Mendes and Mount who conducted the periodic audits.

If you will provide me with your figures on amounts paid for non-asbestos claims, we can probably agree to a stipulation.

Yours very truly,

/s/ Eldon L. Bolton, Jr.
ELDON L. BOLTON, JR.
Senior Counsel - Litigation & Claims

ELBjr/bf

cc: B. Smith - NOLA (17)
J. Montano - Adams & Porter
J. Polk - Adams & Porter

AFFIDAVIT

STATE OF TEXAS §
§
COUNTY OF JEFFERSON §

BEFORE ME, the undersigned authority on this date personally appeared FRANCES BLAIR BETHEA, who after being duly sworn upon her oath stated:

My name is Frances Blair Bethea, I am an attorney licensed to practice law in the State of Texas. I am one of the attorneys of record for the plaintiff in Civil Action No. 1:91-CV-315 captioned The Babcock & Wilcox Company vs. International Insurance Company and United States Fire Insurance Company, in the District Court of the United States for the Eastern District of Texas, Beaumont Division.

Hubert Oxford, III, Kip Kevin Lamb and I appeared on behalf of The Babcock & Wilcox Company at the hearing on Defendants' Motion to Stay, Dismiss and/or Transfer the above-referenced case which was held on May 28, 1992 in the chambers of the Honorable Joe Fisher. Steven C. Barkley appeared on behalf of the Defendants. Also present was Rockne L. Moseley, counsel for the Babcock & Wilcox Company in New Orleans.

All counsel were asked whether or not this hearing should be held in chambers or in open court and were advised that if they desired a record to be made that the hearing must take place in open court. All counsel, including counsel for International Insurance Company and United States Fire

Insurance Company, indicated that no record was necessary and no court reporter was required.

Judge Fisher first heard argument from Steven C. Barkley in support of Defendants' Motion to Dismiss and/or Transfer Venue based on the "first filed rule" and/or 28 USC § 1404(a). Mr. Barkley began by giving a brief summary of the history of the New Orleans case. He stated that International Insurance Company had filed the New Orleans case as a declaratory judgment action. The court in New Orleans dismissed the action stating that under the "Service of Suit" clause, Babcock & Wilcox could pick their forum. This ruling was reversed and remanded. Judge Fisher asked Mr. Barkley whether in reversing or remanding the ruling the Appellate Court had held that Babcock & Wilcox was precluded from filing suit in Texas. Mr. Barkley stated that there was not a question as to whether the Beaumont Court has jurisdiction, but rather he contended that the "first filed rule" clearly controls and requires Judge Fisher to transfer the case to Louisiana. Mr. Lamb argued on behalf of Babcock & Wilcox that the "first filed rule" is not followed when an insurance company "races to the courthouse" to file a declaratory judgment action to forestall suit by the insured. There was a discussion as to the timing of the filing of the Louisiana suit by defendants in relation to the demand letter sent to the Defendants by the Plaintiff, Babcock & Wilcox, informing the Defendants that they (Babcock & Wilcox) would bring suit unless the claims were paid. Judge Fisher stated that he did not believe the "first filed rule" applied absolutely in this case in light of the activities of the insurance companies which included their "race to the courthouse" to file the lawsuit in anticipation of the lawsuit by Babcock & Wilcox.

Mr. Lamb also argued that it was the Movant's

burden to justify transfer of venue pursuant to 28 USC § 1404(a) and that the Movant had not advised the Court what witnesses or documents would not be available to them if the case was tried in Texas.

Judge Fisher denied Defendants' Motion to Dismiss and/or Transfer Venue stating that although the Defendants had the right to file their suit in New Orleans, the Plaintiff also had the right to file this suit in Beaumont. He went on to say that in a situation such as this, it is up to the Court to decide where the suit shall be heard based on the general rules of convenience and availability of witnesses and documents, and it is up to the Court's discretion as to whether to keep the case. He stated transfer was not warranted in light of the location of the non-party witnesses and the fact that the policies at issue were negotiated in Texas. The Judge also stated that Texas has the better contacts for the trial of the suit.

Mr. Barkley did not request the Court to issue or prepare findings of fact or conclusions of law.

To the best of my knowledge, International Insurance Company and United States Fire Insurance Company have not requested the Court to issue any findings or reasons for his decision.

/s/ Frances Blair Bethea

FRANCES BLAIR BETHEA,
Attorney for Plaintiff,
Babcock & Wilcox Company

SWORN TO AND SUBSCRIBED BEFORE me on the 15th Day of June, 1992, by the said Frances Blair Bethea, to certify which witness my hand and seal of office.

/s/ Sharon Romero
Notary Public, State of Texas

OFFICIAL SEAL
SHARON ROMERO
Notary Public
STATE OF TEXAS

My Comm Expires Nov 8, 1992

APPENDIX G

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

NO. 92-4598

Received
JUN 16 1992

In re:

INTERNATIONAL INSURANCE COMPANY AND
UNITED STATES FIRE INSURANCE COMPANY

PETITION FOR RECONSIDERATION OF THE
COURT'S GRANT OF A WRIT OF MANDAMUS

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Attorneys for The Babcock & Wilcox Company

MAY IT PLEASE THE COURT:

This panel's decision to transfer this case from Beaumont to New Orleans is in direct and irreconcilable conflict with the Fifth Circuit's earlier opinion in the New Orleans litigation between the same parties.[1] The earlier ruling expressly recognized Babcock & Wilcox's contractual right to choose a Texas court as the forum in which to litigate its dispute with International Insurance Company (International) and United States Fire Insurance Company (U.S. Fire). This panel's June 25 decision extinguishes that right even though International and U.S. Fire have previously conceded that they are obligated to go to Texas and litigate in that forum:

> Thus, as International and U.S. Fire concede, they must appear in the Texas court in which McDermott has filed its action, and must submit to the jurisdiction of that court. The Service of Suit clause requires as much.[2]

After they appeared in the Texas forum chosen by Babcock & Wilcox, International and U.S. Fire removed the Texas action to federal court. Nothing in the act of removal, however, impairs or diminishes Babcock & Wilcox's right to choose the forum in which to litigate the instant dispute with these insurers. Babcock & Wilcox had the right to have the case remanded to state court,[3] but accepted a federal forum. Thus, the United States District Court in Beaumont became Babcock & Wilcox's forum of choice.

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[1] *International Ins. Co. v. McDermott, Inc.*, 956 F.2d 93 (5th Cir. 1992).

[2] *Id.* at p. 96, n.1.

[3] *City of Rose City v. Nutmeg Ins. Co.*, 931 F.2d 13 (5th Cir. 1991).

It is irrelevant that Babcock & Wilcox assented to a federal forum prior to the date on which International and U.S. Fire filed their Motion to Dismiss and/or Transfer the litigation. In a forum selection case decided last year,[4] the Fifth Circuit approved the following language from *General Phoenix Corp. v. Malyon*:[5]

> Likewise, the *Malyon* court held that the [service of suit clause] "restricts the defendant to the Court in which suit is first begun against it, *be it Federal or State.*"[6]

Babcock & Wilcox's choice of a Texas forum in which to litigate was both reasonable and logical, and will not result in hardship to the defendants. Indeed, in his Amended Order, Judge Fisher found that Texas was a convenient forum for both parties:

> Texas is the more convenient forum. This decision is based on the fact that this location is more convenient for the witnesses, particularly the non-party witnesses, and this is the location where the contract in question was executed as well as this is the plaintiff's choice of forum. Considering all of the factors, this court determines that the more convenient forum is Texas and the [Defendants'] motion for transfer is denied.[7]

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[4] *Id.*

[5] 88 F. Supp. 502 (S.D.N.Y. 1949).

[6] *City of Rose City v. Nutmeg Ins. Co.*, 931 F.2d 13, 15 (5th Cir. 1991), emphasis supplied.

[7] June 16, 1992 "Amended Order Denying Defendants' Motion to Dismiss and/or Transfer Venue."

International and U.S. Fire have not formally contested this factual finding of the district court. To the contrary, although they petitioned for a Writ of Mandamus, they did so on the ground that the Texas litigation should be dismissed, *not* that it should be transferred on grounds of *forum non conveniens*.

CONCLUSION

Without citing reasons for its decision, this panel reversed a ruling by the district court which was reviewable only under an "abuse of discretion" standard. In doing so, the panel contradicted an express holding of a prior panel in related litigation between the same parties. Thus, the previously recognized right of the insured to choose a Texas state court as the forum for this litigation has been eviscerated. Babcock & Wilcox, the insured, is now compelled to litigate in a court of the insurer's choosing, in the venue chosen by the insurer, under circumstances which will require its counsel to travel repeatedly to another state for depositions and discovery.

For all of these reasons, The Babcock & Wilcox Company requests that this Court withdraw its June 25, 1992 Order directing the transfer of this case from Beaumont to the Eastern District of Louisiana. Babcock & Wilcox further requests that the Petition for Writ of Mandamus filed herein by International Insurance Company and United States Fire Insurance Compnay be DENIED.

Respectfully submitted:

/s/ Rockne L. Moseley

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Attorneys for The Babcock & Wilcox Company

CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of July, 1992 I caused a copy of the above Petition for a Writ of Mandamus to be hand delivered to Francis Accardo, Esq., and the Honorable A. J. McNamara, Judge of the United States District Court for the Eastern District of Louisiana, and that I mailed a copy to Kip K. Lamb, Esq., Laurence M. McHeffey, Esq., Steven C. Barkley, Esq., and the Honorable Joe J. Fisher, Judge of the United States District Court for the Eastern District of Texas, Beaumont Division by United States mail, properly addressed and postage prepaid.

/s/ Rockne L. Moseley

APPENDIX H

MINUTE ENTRY
McNAMARA, J.
JUNE 10, 1992

Filed
JUN 10 1992

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

INTERNATIONAL INSURANCE CO. and UNITED STATES FIRE INSURANCE CO.	*	CIVIL ACTION
VERSUS	*	NO. 91-848
McDERMOTT INCORPORATED and BABCOCK & WILCOX INC.	*	SECTION "D" (2)

Before the court in the above-captioned matter is a Second Motion to Dismiss, Stay, or Transfer filed jointly by Defendants McDermott, Inc. and the Babcock & Wilcox Company, incorrectly referred to in the Complaint as Babcock & Wilcox, Inc. The Motion, which is opposed by both International Insurance Company and United States Fire Insurance Co., is before the Court on briefs, without oral argument.

The matter before this court is a Declaratory Judgment action filed by Plaintiffs in a dispute between the parties over insurance coverage relating to numerous asbestos

DATE OF ENTRY JUN 11 1992

injury claims. A suit concerning some of the same matters was later filed in Texas state court, by the Defendants in this Declaratory Judgment action, and subsequently removed to the United States District Court for the Southern District of Texas, Beaumont Division. The current Motion was filed in light of that Texas case.

After due consideration of the memoranda of counsel, attached exhibits, and the applicable law, this court finds that the matters at issue in the present case are more inclusive than those in the Texas case, that this forum is at least as convenient as any other, and that neither dismissal, stay, nor transfer are warranted. Accordingly,

IT IS ORDERED that Defendants' Second Motion to Dismiss, Stay, or Transfer is hereby DENIED.

This court notes that if, in fact, the Texas case preceeds to trial prior to this court's trial date of January 1993, issues resolved at that trial may allow the scope of the present case to be narrowed through motion practice. Should the Texas case not have gone to trial by that time, this court reminds all counsel that trial in the captioned-matter remains set for January 11, 1993, with a Pre-Trial Conference set for December 9, 1992, and this court expects those dates and all associated cut-off dates to be adhered to.

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